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IN THE
COURT OF APPEALS OF INDIANA

GARY TURLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 33A04-0606-CR-309
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENRY SUPERIOR COURT
The Honorable Bob A. Witham, Judge
Cause No. 33D02-0503-FD-68

December 11, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Gary Turley appeals the conviction and sentence imposed upon his plea of guilty to Operating a Vehicle While Intoxicated,[1] a class D felony, and the finding that he is a habitual substance offender.[2] Turley presents the following restated issues for review:

1. Did trial counsel render ineffective assistance in recommending that Turley plead guilty, thus rendering the guilty plea invalid?

2. Did the trial court sentence Turley pursuant to the terms of the plea agreement?

3. Did the trial court properly impose an enhanced sentence?

We affirm.

The facts favorable to the conviction and sentence are that on March 21, 2005, the State charged Turley with operating a vehicle while intoxicated, public intoxication, and being a habitual violator of traffic laws. The State also alleged that Turley was a habitual substance offender. On September 19, 2005, Turley signed a plea agreement containing the following terms:

> The State recommends the Defendant be sentenced to two (2) years to the Indiana Department of Correction on the Operating a Vehicle While Intoxicated to [sic] a Class D Felony and an additional 3 years to the Indiana Department of Correction for the Habitual Substance Offender Enhancement. This sentence imposed in Cause No. 33D02-0503-FD-0068 are [sic] to run concurrent to each other but consecutive to any sentence imposed in Grant County.
>
> The Court will be free to assess any sentence within the range of possibilities greater than the recommended sentence. The parties agree that the additional sentence over the recommended sentence will be suspended.

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[1] Ind. Code Ann. § 9-30-5-3 (West, PREMISE through 2006 Second Regular Session).

[2] Ind. Code Ann. § 35-50-2-10 (West, PREMISE through 2006 Second Regular Session).

> The Defendant will be free to advocate a lesser sentence and the Court will be free to impose a sentence lesser than the State's recommended sentence; and may use any sentence options to include imprisonment, direct commitment to Community Corrections to include in-home detention or work release, or suspend any or all with formal probation.
>
> The Defendant specifically agrees and understands that in furtherance of the Defendant's rehabilitation and as an additional term of this agreement, the Defendant is to pay Ten Dollars ($10.00) into Crime Stoppers, Account No. 0124168945 at Americana Savings Bank, New Castle, Indiana, and bring a receipt showing such payment to the Henry County Prosecutor's Office prior to sentencing hearing.
>
> The Court is to determine license suspension and assess fine and court costs as appropriate.
>
> The State will dismiss the following charges: Count 3: Public Intoxication, Class B Misdemeanor. Count 1: operating as HTV, Class D Felony[.]
>
> The Defendant specifically agrees and understands that an additional term of this agreement is that he waives any and all rights to file a petition for modification of sentence to request a change of placement that he may have pursuant to I.C. 35-38-1-17(b).

Appellant's Appendix at 14-15.

The trial court took the plea agreement under advisement and set the matter for sentencing. At the December 19, 2005 dispositional hearing, the parties informed the court they had agreed to modify the sentence set out in the plea agreement, as reflected in the following comments of the trial court:

> Now, the plea agreement that was filed with the Court indicates you would enter a plea of guilty to a charge of Operating a Vehicle While Intoxicated enhanced to a Class D felony, and you would admit to being an habitual substance offender. Now, counsel has approached a second ago and indicated to me there would be somewhat of a modification to that plea agreement. It had been set for a contested sentencing. However, it would be the parties' intention now that there would be an agreed to sentence. That agreed to sentence would call for on the Operating While Intoxicated, a two (2) year sentence to the Indiana Department of Corrections [sic] and

on the Habitual Substance Offender, a three (3) year sentence to the Indiana Department of Corrections. Those sentences would run, it would be a five (5) year sentence. Is that correct, Mr. Mahoney [the deputy prosecutor]? The State's position?

MR. MAHONEY: Yes, Your Honor.

THE COURT: And that sentence would be consecutive to any sentence imposed out of either Grant or Madison Counties. Is that the State's position?

MR. MAHONEY: Yes, Your Honor.

THE COURT: And Mr. Cox [Turley's defense attorney], is that the defendant's understanding of the plea agreement also?

MR. COX: Yes, that is the agreement, Your Honor.

THE COURT: And, Mr. Turley, is that your understanding of your agreement?

MR. TURLEY: Yes, sir.

Id. at 55-56. After the foregoing discussion, the trial court indicated it would "accept the agreement that's orally been made here by the parties today." *Id*. at 57. The court imposed sentence consistent with the terms of the oral modification, sentencing Turley to two years on the OWI conviction, which was enhanced by three years as a result of Turley's habitual substance offender status.

1.

Turley contends trial counsel rendered ineffective assistance in recommending that Turley plead guilty. Specifically, Turley argues, "that his plea was not knowingly,

voluntarily, and intelligently made because he believed his sentences would be concurrent and so he was not properly advised as to the potential consequences." *Id*. at 8.

This argument constitutes a challenge to the validity of the guilty plea. "One consequence of pleading guilty is restriction of the ability to challenge the conviction on direct appeal. In *Weyls v. State*, 266 Ind. 301, 362 N.E.2d 481[, 482] (1977), Justice DeBruler restated the long-standing principle that 'a conviction based upon a guilty plea may not be challenged by motion to correct errors and direct appeal.'" *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996). Accordingly, Turley may not challenge the validity of his guilty plea in this direct appeal.

2.

Turley contends the trial court failed to sentence him pursuant to the terms of the plea agreement.

The plea agreement in this case essentially consists of two parts. With respect to the first, the State and Turley filed a written plea on September 19, 2005. That plea called for a two-year sentence for the OWI conviction and a three-year habitual substance offender enhancement, with those two terms to run currently to each other. The second part was the oral modification of the sentencing terms that were discussed at the plea hearing, as set forth previously. To review, the State informed the court at the December 19, 2005 hearing that the parties had orally agreed to modify the sentencing terms of the agreement, changing it in only two respects: (1) the sentence was set by the agreement and not left to the trial court's discretion, and (2) the OWI sentence and habitual

substance offender enhancement were to run consecutively, not concurrently. The trial court asked both Turley and his attorney if they understood and agreed with the modification, and they verified that they did. The trial court accepted that modification and imposed sentence consistent with it. Therefore, assuming the oral modification was valid, Turley's claim is factually incorrect, i.e., the trial court *did* impose the sentencing terms consistent with the parties' agreement, as orally modified. As we see it, a claim to the contrary necessarily involves rejection of the validity of the oral modification. Yet, Turley does not challenge the validity of the oral modification. In fact, his brief makes no mention of this issue. Therefore, we will proceed on the assumption that the oral modification was valid.

A plea agreement is contractual in nature, and is binding upon the defendant, the State, and the trial court. *Debro v. State,* 821 N.E.2d 367 (Ind. 2005). A trial court is vested with the discretion to accept or reject a plea agreement and the sentencing provisions contained therein. *Bennett v. State,* 802 N.E.2d 919 (Ind. 2004). If, however, the court accepts a plea agreement, it is strictly bound by its terms, including any sentencing provision, and may not impose any sentence other than the one required by the plea agreement. *Id*.

In this case, the trial court accepted the plea agreement. The agreement provided that Turley would receive a two-year sentence for the OWI conviction, which would be enhanced by three years as a result of Turley's habitual substance offender status. Those two terms would be imposed consecutive to one another, and consecutive to another

sentence imposed for a different conviction in a different court. In accepting the agreement, the trial court was obliged to impose precisely those terms. *Id.* Thus, the trial court properly imposed sentence consistent with the terms of the plea agreement.

3.

Turley contends the trial court committed error by twice enhancing his penalty for operating a vehicle while intoxicated. The first enhancement, he contends, occurred when his OWI offense was enhanced from a class A misdemeanor to a class D felony based upon a prior conviction. He claims the second enhancement occurred when that same predicate offense was used to support the habitual substance offender finding.

Turley claims this double enhancement is impermissible under *Freeman v. State*, 658 N.E.2d 68 (Ind. 1995), and *Devore v. State*, 657 N.E.2d 740 (Ind. 1995). Those cases discussed the overlap between what is now I.C. § 9-30-5-3 (formerly I.C. § 9-11-2-3, enhancing an OWI offense for previous similar offenses within the preceding five years) and I.C. § 35-50-2-10 (habitual substance offender statute). In *Freeman*, the Supreme Court determined the legislature did not intend the habitual substance offender enhancement to apply also to OWI convictions under I.C. § 9-30-5-3. This conclusion was based upon the observation that both statutes were intended by the legislature to be "progressive punishment scheme[s] for repeat offenses involving controlled substances[,]" *Freeman v. State*, 658 N.E.2d at 69, and the conclusion that the legislature did not intend a double enhancement. Rather, "[b]ecause Chapter 9-11-2 (the predecessor of I.C. § 9-30-5) is the statute that specifically regulates punishment for

[OWI] convictions, it supersedes Section 35-50-2-10." *Id*. at 71. If the landscape today were the same as when *Freeman* was decided, Turley's argument would have merit. That, however, is not the case.

In 1996, the legislature amended I.C. § 35-50-2-10(a) by adding the following language: (2) "'Substance offense' means a Class A misdemeanor or a felony in which the possession, use, abuse, delivery, transportation, or manufacture of alcohol or drugs is a material element of the crime. *The term includes an offense under IC 9-30-5* and an offense under IC 9-11-2 (before its repeal)." (Emphasis supplied.) As our Supreme Court subsequently noted, as of the effective date of the 1996 amendment, "prior convictions under I.C. 9-30-5 (operating a vehicle while intoxicated) will be available as predicate offenses for habitual substance offender enhancements." *Haymaker v. State,* 667 N.E.2d 1113, 1115 (Ind. 1996). Because I.C. § 9-30-5-3 has not been changed in this respect since the 1996 amendment, the above-quoted observation in *Haymaker* remains good law. Therefore, the trial court did not err in imposing a sentence enhancement under I.C. § 35-50-2-10(a) using the same predicate offense that was used to elevate Turley's OWI offense under I.C. § 9-30-5-3. *See also Weida v. State,* 693 N.E.2d 598 (Ind. Ct. App. 1998), *trans. denied*.

Judgment affirmed.

NAJAM, J., and DARDEN, J., concur.